# Petition

81-507

Office - Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

# Supreme Court of the United States

**JEWETT, MARTHA,**

*Petitioner,*

*v.*

**INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,**

*Respondent.*

ON PETITION FROM THE JUDGMENT OF
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
SAT BELOW: JUDGE GIBBONS

---

## PETITION FOR WRIT OF CERTIORARI

---

Brach Eichler, Rosenberg,
Silver, Bernstein & Hammer, P.A.
*Counsel for Petitioner*
101 Eisenhower Parkway
Roseland, New Jersey 07068
(201) 228-5700

*On the brief*
William L. Brach, Esq.

## QUESTIONS PRESENTED

1. The Third circuit in specifically determining that there was no evidence in the record to support a finding of a continuing pattern and practice of discrimination is in conflict with the treatment in other circuits which have found extreme statistical disparity by sex in managerial employment, as existed in the record of this case, sufficient to establish a prima facie case.

2. Where defendant-respondent failed to rebut or explain the statistical disparities evidencing the likelihood of sex discrimination in job promotion, Plaintiff-Petitioner's suit should not and cannot be dismissed on appeal "as a matter of law."

3. The Court should examine the applicability of the "continuing violation" doctrine as applied to the failure of an employer to provide promotional opportunities to a long-term female employee even in the absence of a particular existing vacancy to which promotion was denied where:

a. The pattern of employment in managerial positions reflects an imbalance heavily weighted in favor of male employees and limited to a token level under 2% for female employees for an uninterrupted eight year period continuing through the time of filing of the charges.

b. The employer had prior to and during the relevant period no established procedure for promotion but rather promotion practices were subjective, informal and personal between employee and supervisor.

c. The female employee plaintiff was acknowledged by the employer to be employed below her capabilities and potential and was in fact demoted during the eight year period prior to the initiation of this matter.

d. No attempt was made to aid the employee to obtain advancement until the time a formal complaint was filed in the U. S. District Court.

4. The Third Circuit, in reversing the Trial Court, improperly rejected by implication the Consent Decree entered into between the EEOC and ITT not withstanding Rule 407 which permits the use of such a judgment to show that there were feasible means available to Defendant and, in fact, adopted by Defendant and that these means, if employed, would have counteracted the preexisting disparity in promotion to managerial positions and would have corrected the conditions complained of by Plaintiff-Petitioner resulting in her not being afforded promotional opportunities.

5. The Court should consider whether Rule 39 imposing thousands of dollars of Costs on appeal, where an individual plaintiff in an employment discrimination case has been held at the Administrative Level to have "reasonable cause" and prevailed at the trial level, is a burden of such character as to have a chilling effect on individuals of modest means who would otherwise use our judicial system to vindicate their rights to equal employment and promotional opportunities.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented. . . . . | 1 |
| Table of Contents. . . . . | iii |
| Cases Cited. . . . . | iii |
| Table to Appendix. . . . . | iv |
| Opinions Below . . . . . | 1 |
| Jurisdiction . . . . . | 1 |
| Statutes, Federal Rules, and Regulations Involved. . . . . | 1 |
| Statement. . . . . | 2 |
| Argument . . . . . | 12 |
| Point 1 . . . . . | 12 |
| Point 2 . . . . . | 14 |
| Point 3 . . . . . | 15 |
| Point 4 . . . . . | 15 |
| Point 5 . . . . . | 16 |
| Point 6 . . . . . | 17 |
| Conclusion . . . . . | 19 |


## CASES CITED


| | |
|---|---|
| Barnett v. W.T. Grant Company, 518 F. 2d 543, 549-550, (4th Cir. 1975) . . . | 14 |
| Clark v. Olincraft, 566 F. 2d 1219 (5th Cir. 1977) cert. den. 434 U.S. 1069 (1978). . . . . | 15 |
| Davis v. Califano, 613 F. 2d 957, (D.C. Cir. 1980). . . . . | 12,14 |
| Hazelwood School District v. United States, 433 U.S. 299 (1977) . . . . | 13 |
| International Brotherhood of Teamsters v United States, 431 U.S. 324, (1977) | 13 |
| King v. Yellow Freight System, 523 F. 2d 879 (8th Cir. 1975) . . . . . | 14 |
| Muller v. United States, 500 F. 2d 928, (10th Cir. 1975). . . . . | 15 |
| Reed v. Lockheed Aircraft Corporation, 613 F. 2d 757 (9th Cir. 1980) . . . | 14 |
| Rich v. Martin Marietta Corporation, 522 F. 2d 333, 348 (10th Cir. 1975) . . | 15 |

TABLE TO APPENDIX


| | PAGE |
|---|---|
| Opinion of Judge Gibbons, United States Court of Appeals for the Third Circuit. . . . . | 1a |
| Opinion of Judge Stern, United States District Court for the District of New Jersey . . . . . | 10a |
| TABLE II, ITT Defense Communications Division, (Extracted from Exhibit P-30). . . . . | 28a |
| Judgment of the United States Court of Appeals for the Third Circuit, Dated June 08, 1981. . . . . | 29a |
| Order of the United States Court of Appeals for the Third Circuit, Dated August 07, 1981. . . . . | 30a |

## OPINIONS BELOW

The opinion of the District Court for the District of New Jersey is included in this appendix.

The opinion of the Court of Appeals for the Third circuit is included in this Appendix.

## JURISDICTION

The judgment of The Court of Appeals for the Third Circuit was made and entered on June 8, 1981 and copies thereof are appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

## STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

42 USC §2000e et seq.
Federal Rule of Evidence 407 §2000e-2.
Discrimination because of race, color, religion, sex, or national origin.

(a) Employers. It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 39. Costs.

(a) TO WHOM ALLOWED. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(c) COSTS OF BRIEFS, APPENDICES, AND COPIES OF RECORDS. Unless otherwise provided by local rule, the cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of records authorized by Rule 30 (f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

STATEMENT

Plaintiff-Petitioner, Martha Jewett, is a female employee of the Defendant-Respondent International Telephone and Telegraph Corporation (ITT) who filed a complaint in the United States District Court for the District of New Jersey on April 26, 1976 alleging unlawful discrimination in promotion and other conditions of employment in violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. Section 2000e et seq.

Plaintiff-Petitioner seeks back pay and other benefits arising out of employment to which she would have been entitled had Defendant-Respondent acted in accordance with the law. After a four-day trial, the U.S. District Court found for the Plaintiff and awarded damages totalling $16,307.00,

an increase in current salary, legal fees of $31,941.79, the amount of which were not contested on appeal. The plaintiff was given a promotion in April, 1976 contemporary with the commencement of suit and the award was for the period authorized by statute prior to the filing of the initial complaint, (i.e. November 11, 1972 to the date of the promotion in 1976)

Upon appeal, the United States Court of Appeals for the Third Circuit in an opinion filed June 8, 1981, reversed finding that there was "no evidence ... of disparate treatment within 180 days of filing or a pattern and practice of discrimination extending into the statutory 180 day period" by defendant and that, therefore, Defendant-Respondent was entitled to judgment as a matter of law. Plaintiff-Petitioner was thereafter taxed with costs of $4813.17 which have been reduced by the Third Circuit to $2406.58.

Plaintiff-Petitioner filed a charge of discrimination initially with the Equal Employment Opportunities Commission (EEOC) on November 11, 1974. The EEOC found reasonable cause to believe that Plaintiff's charges of discrimination in the provision of promotional opportunities were true. Defendant-Respondent refused to enter into settlement discussions and the EEOC issued to Plaintiff-Petitioner a Right to Sue notice on February 3, 1976. (521a).[1].

---

1. All material cited in this manner refers to the Appendix to Defendant-Appellant's Brief.

Plaintiff-Petitioner's initial complaint was filed in behalf of a class consisting of all women employed by ITT Defense Communications Division of Nutley, New Jersey employed as of and after July 1, 1965, and while the litigation was pending. On August 11, 1977, Plaintiff's action was consolidated with an action commenced by the EEOC, raising the same issue of discrimination against females as a class by reason of their sex, against the same division of ITT subsequent to the initiation of Plaintiff-Petitioner's suit. (28a).

A Consent Decree treating with the precise issues raised by the Plaintiff-Petitioner, that is, establishment of policies and procedures to assure that promotional opportunities be provided to females employed by the Defense Communications Division of ITT was entered on August 21, 1979. The Consent Decree contains a disclaimer to the effect that it does not constitute an admission of any violation of Title VII of the Civil Rights Act. Although filed in the same consolidated action, Plaintiff-Petitioner was not a party to nor a signatory on the Consent Decree (28a-35a).

The significant aspects of Plaintiff-Petitioner's employment by ITT are:

1. Long uninterrupted service - thirty-eight (38) years (51a to 53a).

2. Early recognition of superior skills, Executive Secretary to Sales Manager at age twenty-eight (28) two years after commencing employment (55a-7, 56a-21 to 57a-24).

3. Responsibility for operating office in the absence of male superior (58a-1 to 7 and 62a-19 to 64a-3; 91a-23 to 93a-2).

4. Service at top executive level as secretary to the President of Federal Telephone and Radio Company (64a to 69a-23).

5. Service in variety of Departments, Sales (58a-1 to 7); Technical Department (60a-25 to 61a-3); Executive level (see #4); Public Relations (70a-5); Personnel (36a-8 to 23; 94a-5 to 97a-3).

6. Service in supervisory capacity with administrative responsibilities for twenty-three (23) other employees (76a-9 to 14).

7. Prior to the ultimate limited promotion, service in other capacities besides "secretary," Personnel Assistant, (86a-8 to 23; 94a-5 to 97a-3; Placement Representative (91a-4 to 9).

8. Capacity to initiate (acknowledged by Petitioner's supervisor) - recommended and then implemented the creation of an "Office Service Department" (73a-24 to 77a-2).

Most significant of all were the consistent evaluations of her superiors. In 1959 General Lanahan, President of Federal Electric Corporation evidenced his confidence in the Plaintiff-Petitioner by approving her recommendation to organize a new department and designating her as supervisor. (73a-2 to 77a-2). In 1968, Plaintiff's supervisor, H.C. France wrote:

> Miss Jewett possesses excellent professional attitude and ability. She is very thorough in completing her assigned responsibilities and has been very helpful in recommending and implementing changes to upgrade the effectiveness of her position. I feel that Miss Jewett is being utilized at a level below her capabilities and that she should be considered for an administrative position with supervisory responsibilities if a suitable opportunity presents itself. (491a).

In 1969, H. C. France wrote:

> Miss Jewett continues to display a high degree of professionalism and should be considered for a position that would take better advantage of her abilities and experience while providing her with a challenge. I feel that the appraisal shown below is a direct result of the lack of challenge of the position.(492a).

In 1970, the same supervisor wrote:

> During the past year Miss Jewett has been very effective in carrying out her job responsibilities and has made a significant contribution toward increasing the overall efficiency of the department.
>
> . . .
>
> Miss Jewett operates very effectively without immediate supervision and has on numerous occassions(sic) completed special assignments with a minimum of direction. She is continuing the dull and boring job of updating our historical personnel file of separated employees. (493a).

Her supervisor in 1972, T. Kielty, concurred:

> During this review period Miss Jewett has performed her duties and assignments in a most professional manner. Miss Jewett operates without immediate supervision and is most efficient in planning and carrying out her assignments on a timely basis. Through her thorough understanding of departmental policies and procedures Miss Jewett often anticipates areas for close attention and prepares the necessary data for review. This operational knowledge has been of great assistance in the operation of the department.
>
> Special assignments that have been given to Miss Jewett usually on a crash basis have been completed satisfactorily and with a minimum of supervision. ...
>
> In the operation of the Personnel Rec. (sic) section her accomplishments have been handled very professionally and has resulted in much cost savings. (495a-496a).

ITT classifies its employees from Grade 3 to 26. In light of the foregoing, Plaintiff's lack of progress, even more blatant, regression, defies understanding. (514a).

TABLE I (514a)

| Month-Year | Employment Status-Grade |
|---|---|
| 10-1964 | 8 |
| 1-1966 | 9 |
| 12-1967 | 9 |
| 12-1974 * | 7 |
| 1-1976 ** | 8 |
| 4-1976 | 10 |

* Charges filed with EEOC 11-1974

** Right To Sue notice from EEOC received by Plaintiff 2-1976.

In April, 1976, as noted at the time suit was commenced, sixteen months after the initial filing of a complaint with the EEOC, Plaintiff-Petitioner was promoted to a Grade 10 with the title Material Cost Administrator. At trial, this "promotion" was explained by ITT's counsel in denying that it was offered as "some kind of recrimination against her for filing the charge"-

> "we say that job was made an (sic) offered to her to get her out of personnel because we felt that there were leaks in there." (348a-21 to 349a-1).

And at (459a-22 to 24).

> "if she wants to stipulate that that job, there was no opening for that job, that job was provided her to get her out of personnel because of security problems."

The "security problems", as a reading of the text will show, (280a-8 to 18; 288a-2 to 6) was a claim that Plaintiff-Petitioner had released information showing disparate treatment by reason of sex from personnel files to another female employee who was filing charges with the EEOC; this employee received a settlement of $15,000 as part of the Consent Decree. (31a).

The above recitation shows a downgrading in title in 1974 (but not in salary) from Grade 9 to 7 on the basis of the nature of her work assignment. Plaintiff-Petitioner was notified of the downgrading on November 25, 1974, two weeks after she filed a complaint with the EEOC. (191a-4).

In short, from 1964 to 1974, Plaintiff went backwards in grade.

There is no factual dispute that Plaintiff-Petitioner registered continually throughout her employment and during the critical 180 day period prior to filing of her complaint her desire to be considered for promotion. This is cited as a factual finding in the Trial Court's opinion (480a-11 to 16) and P-39, Memorandum for Record of Recchia (539a). Recchia was Director of Personnel from May 1972 on. (404a-11 to 19).

During the 180 day period prior to filing the complaint with the EEOC, Plaintiff-Petitioner registered her request for promotion with her superior. (184a-3 to 8). Plaintiff, on July 8, 1974, four months prior to filing her charges, wrote to Mr. Noland, President of the DCD Division of ITT requesting an interview which was granted and held in August. (509a-510a, P-19). She once again requested consideration for a promotion (153a-18 to 22). Plaintiff-Petitioner specifically requested a chance to be evaluated by the assessment center at ITT headquarters which had the specific function of determining the potential of employees to "move up within the company." (180a-15 to 20).

Mr. Noland promised to try and secure for Plaintiff-Petitioner an opportunity to be assessed. She requested that she hear from him. She received no response after the interview. (154a-22 to 155a-17). Two months later Plaintiff-Petitioner warned the Personnel Director that if no action were taken she would seek her legal remedies. (184a-3 to 8). Again nothing was done. (180a-25 to 181a-2).

From 1966 through the filing of the complaint (in fact, up to the time of the Consent Decree), the Division had no standard practices and procedures for notifying employees who might be interested of upcoming vacancies. Defendant admitted upcoming vacancies for non-union (managerial) jobs were not posted on company bulletin boards. (187a-18 to 19; 400a-9 to 12; 101a-5 to 13; 102a-13 to 19; 110a-2 to 7).

Similarly, ITT had no standard policies for promotion of employees from one grade to another. (400a-13 to 15). It had no application forms, interviewing forms or testing procedures for promotion (400a-24 to 401a-1).

Typical of the testimony of various male employees who testified at trial as to how they gained their managerial grade was that of Mr. Robert Lehman who became Director of Personnel and later a Vice President. He did not apply for advancement, rather "they moved me into this assignment as an opportunity developed." (392a-25 to 393a-1) and at 394a-11 to 17 referring to the position of personnel manager -

> "if you're in the assignment and you can indicate you have the potential and ability to move ahead, the opportunity to move ahead is presented to you based on what you can demonstrate."

Other male managerial employees testified to the same effect. Michalowski (385a-5 to 11); McMahon (363a-14 to 16; 364a-19 to 24; 365a-11 to 12; 367a-4 to 19). The common thread, unrebutted anywhere in the record, is that vacancies were made known by private conversation. Promotion came about by personal recommendation.

Statistical consequence of the practices and procedures show almost complete male presence in supervisor-managerial positions and conversely overwhelming predominance of female employees in low-grade clerical positions up to and through the critical period. See Table II in Appendix showing this total imbalance.

During the years 1967 through 1975, at least 1078 women had been employed at the two facilities comprising the Defense Communications Division, according to the EEO 1 Reports filed by ITT. (522a to 531a). In 1974, only 1.2% of all those classified as officials and managers were women; only 2.5% of the professionals employed were women; 11% of all the technicians employed were women; but 23% of the semi-skilled labor were women, and 73% of all office and clerical employees were women.(530a). During the entire reporting period from 1967 to 1975, there had never been a woman sales worker at this Division. (522a to 531a). Women service workers were eliminated in 1968. (523a).

ITT had grades of employment from 3 to 26. (211a-18). The first 8 grades consisted of clerical employees and 80% of the women were in this group. (530a). Grades 9 to 18 were middle management and grades 19 and over were top executives. In 1974, there were no females holding employment grades 16 to 18, upper management grades. (208a-24).

From 1972 through 1976, no department or divisions heads were women. (395a-16). No women held any supervisory positions within this period of time. (214a-5).

Beginning in 1972, it was the Plaintiff's responsibility to compile a list of employees of her Division to be sent to ITT headquarters to be programmed into a computer bank for the purpose of identifying employees for promotion within the organization. (113a-6 to 11; 168a-5 to 171a). The list was called Registry of Employee Development Information, abbreviated REDI. (171a). The REDI program went into effect in 1972 or 1973 (174a-6) and Plaintiff prepared the lists for each year from 1972 through 1976. (174a-6 to 12). These promotional lists, as finally approved, never contained a woman's name from 1972 to 1976. (174a-22).

## ARGUMENT

1. In contrast to the treatment in other Circuits, the Third Circuit Court without discussion or analysis stated a conclusion that there was "no prima facie case of a pattern or practice of sex discrimination in the respect relied upon" failing to give cognizance to the statistical data previously set forth. Given the fact that the proofs in the record demonstrate drastic disparities in the managerial categories of long standing continuing to and through the litigation itself, the Circuit Court's conclusion was at variance with the treatment rendered similar proof in other circuits and at least in class action cases by the Supreme Court itself.

Unlike the Third Circuit in this instance, the United States Court of Appeals, District of Columbia Circuit in Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1980) found statistical data essentially similar to that produced in this record, showing a disproportionate percentage of male employees in

higher grades as against the female employees in the National Heart Lung and Blood Institute as establishing a prima facie case. (at 963). The Court rejected the notion that establishing a prima facie case from statistical data was confined to class actions explicitly holding that statistical evidence may establish a prima facie case in an individual case. (at 962).

Such statistical data was recognized as evidential in establishing a prima facie case in International Brotherhood of Teamsters v. United States, 431 U.S.324, (1977). Here, in a class action the Government was held to have carried its burden of proof on the liability phase when the disparities between the total work force minority percentages (Negroes and Spanish-surnamed Americans) was contrasted to the percentages serving as line drivers. The Court cited the percentages of minority members holding "low paying city operations and serviceman jobs" in comparison to nonminority employees. These statistics precisely parallel the data included in the proofs at trial, incorporated as part of the briefs and argument before the Third Circuit but simply erased from the proceedings by a one line conclusion that no such evidence existed in the record.

Hazelwood School District v. United States, 433 U.S. 299 (1977) which was also a class action suit, employed statistical disparities showing that the percentage of Negro teachers in the school district was minimal compared to the percentage of school teachers in the County. While remanding the case to the District Court for further evaluation of the statistical data, the Court notes that: "Where gross statistical

disparities can be shown, they alone in a proper case constitute prima facie proof of a pattern or practice of discrimination."

The Ninth Circuit in Reed v. Lockheed Aircraft Corporation, 613 F.2d 757 (9th Cir. 1980) reversed and remanded a determination for the employer in a suit against Lockheed parallelling Martha Jewett's against ITT based on job stagnation of a long-time female employee that the plaintiff there might establish a prima facie case "through statistical data indicating a disparity between the overall percentage of female employees at Lockheed and the percentage of females in better paid managerial positions." (at 762) This is precisely the data tabulated supra and contained at 522a et seq. See King v. Yellow Freight System, 523 F. 2d 879 (8th Cir. 1975).

2. The dismissal by the Third Circuit in the instant case as "a matter of law" further contradicts decisions in other circuits because it failed to take cognizance of the fact that promotional opportunities were not posted and of the absence of established procedures or criteria for promotion. It was done subjectively resulting in overwhelming advancement of male employees by male supervisors. In Davis v. Califano, supra at 965, the Court recognized that the employee's case based on statistical data was "bolstered by the subjective and ad hoc nature of Appellee's promotion decisions." In that case as in this one, there were no objective criteria but rather promotion decisions were made by superiors who were predominantly male. Barnett v. W.T.Grant Company, 518, F2d 543, 549-550 (4th Cir. 1975) is a racial discrimination case to

the same effect recognizing the tendency of nonobjective word-of-mouth procedures to perpetuate discrimination practices; also, Muller v. United States, 500 F. 2d 928 (10th Cir. 1975).

3. In Rich v. Martin Marietta Corporation, 522 F. 2d 333, 348 (10th Cir. 1975), the court states "once a plaintiff has shown he is qualified, he need only show a discriminatory impact and that he was among the class of employees who could have been considered for promotion" to have made a prima facie case. It is clear from Martha Jewett's evaluations that her supervisors thought she was qualified for a higher position than the one she was currently holding. The court in Clark v. Olinkraft, 566 F. 2d 1219 (5th Cir. 1977) cert. den. 434 US 1069 (1978) does not agree with the defendant employer's contention that failure to promote is not a continuing violation and in fact considers when plaintiffs challenge the entire promotion system "maintaining that it continually operated to hold them in lower echelons" that it is not necessary to show a specific opening during the statutory period.

4. Specifically evidencing the continuing practice of defendant during the period of the litigation of holding the advancement of women into the higher managerial grades is the EEOC reports filed in 1974 and 1975, 530a and 531a, where males during the year increased from 168 to 179 and women remained at a token number, two. The highest number of women so employed was in 1971, three. The statistics in the tables show that Defendant-Employer, ITT, except in two or three isolated instances did not promote women into higher managerial positions during the period 1966-1975.

5. We raise for the Court's consideration whether Rule 407 was designated to apply in circumstances such as these where:

> A. Plaintiff-Petitioner although a party to the litigation was not made a party to or privy to the Consent Decree and had then pending a claim pertaining to the very issue embodied in the decree.
>
> B. Where the corrective steps embodied in the decree reflect not simply a private claim but remedies for a continuing violation of an important public policy set forth in Federal Statutory law.
>
> C. Where the EEOC's action resulted in precluding Plaintiff-Petitioner from pursuing her class action, filed prior to the EEOC's own complaint, and precluded Plaintiff-Petitioner's rights to have the pattern and practice issue resolved in the context of the class action.

To hold otherwise results in remedying previous deficiencies for everyone in the class except for Plaintiff-Petitioner who, by filing a complaint, brought the matter to the attention of the federal authorities in the first instance.

Assuming application to this matter, Rule 407 is explicit in not excluding as evidence remedial actions after an event to show the "feasibility of precautionary measures." We submit that the Court should consider whether the institution of various practices to encourage women to avail themselves of promotional opportunities (See

Consent Decree, paragraphs 6,7,8 30a-31a) do not fall within this nonexclusionary provision of the Rule. The very fact that under the Consent Decree Defendant-Respondent has undertaken to provide females such as Plaintiff-Petitioner who do "inquire about higher level jobs" "an explanation of the nature of the vacancy at the higher level and all other relevant information," is evidential that this could and should have been done in the instance of Plaintiff-Petitioner during the earlier statutory period. Plaintiff-Petitioner testified, without refutation by defendant, that inquiries pertaining to promotional opportunities were in fact made by her and that the requisite information on such opportunities was not in fact provided. (Paragraph 7, 30a-31a)

Similarly, in Paragraph 6 on and after August 21, 1979 Defendant-Respondent undertook specific steps to apprise females of job openings and vacancies and to encourage "female employees to apply for promotional opportunities." Plaintiff-Petitioner had sought this and it was not forthcoming during the statutory period. In lieu of being encouraged to apply for promotion Plaintiff-Petitioner was demoted (190a-19 to 191a-6).

Again we petition the Court to review the application of Rule 407 to determine whether the absence of such steps and procedures are not evidence of a feasible means of countering the results reflected in the statistical imbalance as to employment by sex in managerial positions.

6. The operational effect of the rules that would impose heavy costs on a respondent, successful in the Trial Court, but reversed on appeal is to establish a costly

penalty for those daring to seek equality. In this case a woman of modest means was determined by the EEOC to have reasonable cause to bring a sex discrimination action, she was given a Notice of Right to Sue by the EEOC (16a), she did so sue and won in the U.S. District Court. When the corporation appealed at the Circuit Court level and won on appeal, not only did the female petitioner lose the back pay awarded her below but she is now penalized several thousands of dollars to pay for the expensively printed appellate briefs and appendix of this corporation.

The governing rules provide no equivalent to a respondent to Forma Pauperis. Sup. Ct. R. 46. Certainly this will serve as an object lesson with chilling effect on other individuals without great financial means who are considering turning to our court system to vindicate their rights.

Can this be what Congress intended when it passed legislation such as Title VII providing as it does for the attorneys' fees and recovery of costs to assure open access to the courts? In light of the foregoing should not the Court reconsider in this type of litigation the effect of the Rule on Costs, Fed. R. App. P. 39, on the ability of individuals where reasonable cause has been determined to exist by an administrative agency to attempt to use the judicial system of the United States?

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Brach, Eichler, Rosenberg, Silver, Bernstein & Hammer, P.A.
William L. Brach
Attorney for Petitioner
101 Eisenhower Parkway
Roseland, NJ 07068
201-228-5700

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 80-2371

---

JEWETT, MARTHA,

*v.*

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

*Appellant*

(D. C. Civil No. 76-0759)

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

Argued April 21, 1981

Before: SEITZ, *Chief Judge*,
ALDISERT and GIBBONS, *Circuit Judges*

(Filed June 8, 1981)

---

JOYCE M. USISKIN, ESQUIRE
(Argued)
One Palmer Square, Suite 402
Princeton, New Jersey 08540
*Attorney for Appellee*

THOMAS L. MORRISSEY, ESQUIRE
(Argued)
ROSEMARY A. HALL, ESQUIRE
CARPENTER, BENNETT & MORRISSEY
744 Broad Street
Newark, New Jersey 07102
*Attorneys for International Telephone and Telegraph Corporation*

## OPINION OF THE COURT

GIBBONS, *Circuit Judge*

International Telephone & Telegraph Corp. (IT&T) appeals from a final judgment awarding to an employee, Martha Jewett, a promotion, $16,307 in back pay, and $31,194.79 in attorneys fees and expenses in her action charging sex discrimination in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e *et seq.* We reverse.

Jewett filed a charge of discrimination with the Equal Employment Opportunities Commission (EEOC) on November 11, 1974. The EEOC issued a notice of right to sue on February 3, 1976, and this action was commenced on April 26, 1976. Since timely filing is a prerequisite to the maintenance of a Title VII action[1] Jewett must establish that she was subject to unlawful discrimination within 180 days prior to November 11, 1974. She contends that she did so in two ways: (1) by showing that within the relevant 180 days she was denied promotion to a position she sought, for which she was qualified, and to which a less qualified male was appointed[2]; and (2) by showing that a pattern or practice of intentional sex discriminaton which disadvantaged her in opportunities for training prior to the relevant 180 days continued to disadvantage her in promotion during that period.[3]

The case was tried to the court without a jury, and in the findings of fact dictated from the bench no men-

---

1. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

2. *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 791 (1973).

3. *See* Kunda v. Muhlenberg College, 621 F.2d 532, 546 (3d Cir. 1980); Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 760 (9th Cir. 1980); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 243 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

tion is made of a specific promotion denied her for which she applied and was qualified within the relevant period. Jewett urges, nevertheless, that there is such evidence. On July 8, 1974 she wrote a memorandum to the President of the IT&T division which employed her seeking a promotion, and on August 28, 1974 he interviewed her. About that time the positions of Supervisor of Employee Relations and Manager of Employment became available and were filled by a male, John McMahon. Jewett was a personnel assistant, and a high school graduate with no college training, then employed at IT&T grade 9. McMahon was a grade 16 employee with an Associate Degree in electronics. There is no evidence from which the court could have found that Jewett's qualifications equalled McMahon's. That undoubtedly explains why the district court made no finding of a specific incident of discrimination within the statutory period. At oral argument Jewett's attorney conceded that aside from the McMahon promotion she could point to no specific incident of discrimination within 180 days of November 11, 1974. That incident does not meet the tests for a prima facie case of disparate treatment since, although Jewett may have been qualified for the positions filled by McMahon, he had superior qualifications.

Rather than focus on a specific incident of discrimination, however, the district court appears to have premised liability on the existence of a systemwide continuing violation. We may assume that the continuing violation theory is available to remedy employment practices and policies, not otherwise sheltered by law,[1] which operate to deny present employees transfer or promotion on the basis of sex, where the practice or policy accounting for the denial remains in effect within 180 days of the charge. *See Shehadeh v. Chesapeake & Poto-*

---

1 *Cf.* United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) (compact within statutory period of bona fide seniority system exempt from Title VII by virtue of section 703(h), 42 U.S.C. §2000e-2(h)).

*mac Telephone Co.*, 595 F.2d 711 (D. C. Cir. 1978); *Patterson v. American Tobacco Co.*, 586 F.2d 300 (8th Cir. 1978); *Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); see generally, Sullivan, Zimmer, & Richards, *Federal Statutory Law of Employment Discrimination* §3.5 at 276-83 (1980). Suits may be brought by victims of one or more discriminatory acts occurring before the limitations period, so long as the plaintiff establishes that the offending practice is an ongoing one. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980); *Clark v. Olinkraft, Inc., supra.*[5] Such a case differs from *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), relied on by defendant I.T.&T. *Evans* dealt with a discrete one-time violation (a discriminatory discharge) which only had continuing effects, rather than with a pattern and practice of discrimination which continually, often imperceptibly, operates to hold women employees in lower echelons without making itself readily apparent.

To prevail on a continuing violation theory, however, the plaintiff must show more than the occurrence of isolated or sporadic acts of intentional discrimination. The preponderance of the evidence must establish that some form of intentional discrimination against the class of which plaintiff was a member was the company's "standard operating procedure." *Teamsters v. United States*, 431 U.S. 324, 336 (1977). There is a substantial question whether the pretrial order (36a), which incorporates Jewett's factual contentions (47-49a), actually presented for trial a charge of pattern or practice of in-

---

5. The time of filing would, of course, mark the time for computing the two-year limitation on backpay, and it might even prevent the award of any monetary relief if the absence of job openings during those years were shown. *See* Sullivan, Zimmer & Richards, *supra*, at 280.

tentional sex discrimination, and there are some indications in the record that during the trial the court assumed such a case was not being presented (83a). Nevertheless, since a discriminatory pattern or practice amounting to a continuing violation affecting Jewett in the statutory period was cited by the district court in support of its judgment, we turn to the evidence on which the trial court relied.

That evidence related to the 1971 appointment of Thomas Kielty as Manager of Compensation. The court noted:

> I have no doubt in my mind that the genesis of this case lies in the fact this plaintiff could not get along with Mr. Kielty and Mr. Kielty could not get along with this plaintiff.
>
> . . .
>
> Now, I am confident that by 1971 she did, in fact, have personality problems. But what does that born of? There are documents, particularly, an exhibit introduced this morning, plaintiff's Exhibit 39, which is a memorandum prepared by Mr. Recchia, which demonstrates that it cannot be said that this was a plaintiff of ITT who had no ambition for advancement during her nearly 40 years of service with ITT. It cannot be said that she did not seek promotions. This document prepared by a supervisor mindful of an EEOC complaint states that in several portions that over the years she had repeatedly requested and demanded promotions and greater responsibility, and this is consistent with everything that I saw displayed on the witness stand.
>
> Well, what happens to someone after 20 or 30 years of dedication service? Not 40, because by 1971, it was nearly 30, not yet nearly 40. What happens in 1971 when you worked at a place since 1943 and you see a 27 or a 28 year old brought in and promoted into a position when you worked in a

company longer than that individual has been on this earth? It is not unusual, it is not unexpected that there should be a clash of personality.
I find to be the fact that all of the plaintiff's efforts in the area of sex discrimination originated due to her dissatisfaction with the interface between herself and Kielty. I think she would have even been prepared to accept the fact that Kielty had been promoted into that position or hired in to that position instead of her, because I do find it to be a fact that at that time she did not regard herself as being qualified for that position. She said that on the witness stand before me several weeks ago. (467a-471a)

Thus, significantly, the 1971 promotion of Kielty was not an act of sex discrimination, although it is identified as the triggering event for Jewett's dissatisfaction and her interest in women's rights. The court continued:

> But I think deep within her, she understood that something was wrong and when, thereafter, she didn't get the kind of raises she thought she should, the whole thing began to disintegrate and so within a matter of a month or two, I believe it was in July or August of 1973 after Kielty made her the only employee within his aegis who did not get a raise and denied her six or seven hundred dollar raise, the plaintiff became very interested in the cause of women's rights and wanted to take a seminar and that you denied her, then everything began to fall apart. (471a).

Evidence establishing her dissatisfaction with the kind of raises she thought she deserved does not, however, support a legitimate inference that her lack of progress was due to a pattern or practice of sex discrimination. But the court then concluded:

> There is no doubt in my mind that the plaintiff in this case would have gone much farther in this

> company had she been a man with the same talent, the same dedication. There would have been no need for this woman to have applied for a specific position. (471-2a)

We construe this language to be a finding by the district court that at some time in the past IT&T had a pattern or practice of selecting rank and file men, but not women, for promotion without the necessity for applying to a specific position.

There are several difficulties with reliance on that finding as support for the judgment. First, while there is evidence from which the court could find that men were selected for promotion without the need for applying for a specific position, no evidence is referred to, and we have found none, which would support the conclusion that as a matter of general practice women were not. Thus there was no prima facie case of a pattern or practice of sex discrimination in the respect relied upon. Second, the court did not expressly find that such a pattern or practice, assuming one existed, was still ongoing; if anything, the court implied that whatever discriminatory pattern or practice may have existed had ended long before the actionable period. Nor did the court find, nor on this record could it find, that IT&T's prior failure to select Jewett for promotion to jobs for which she had not applied disadvantaged her in promotion during the actionable period by the action of any rules of eligibility operative during that period.[6]

---

6 *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Under *Griggs* an otherwise neutral promotion requirement or selection device which currently perpetuates the effects of past discrimination by its disproportionate impact on the victims of such discrimination gives rise to a continuing violation which arguably may be challenged by any present employee since the existence of such a system deters that employee from enjoying her full Title VII rights and threatens to adversely effect her in the future. Patterson v. American Tobacco Co., *supra*, 586 F.2d at 304; Stallings v. Container

The only finding that the court made about "spill over" within the statutory period is this:

> I find it to be a fact that the plaintiff in this case was difficult and harassable during the actionable period, and I find it to be the fact that in large measure, those difficulties and harassability were caused by her perceived, correctly perceived, notion that she had been treated unfairly. (473a).

Thus the critical finding supporting the judgment below is that because of a prior pattern or practice at IT&T's Kearny Works of promoting rank and file men to positions for which they had not applied, while not doing the same for women, Jewett developed a personality disorder which operated to her disadvantage in the actionable period. However, Jewett's difficulty and irascibility during the operative period cannot, alone, support a finding that there is a continuing violation of Title VII. On this record, it would at best be evidence that the effects of a past violation continue, not that the violation itself continues. Moreover, even if we were to assume that the violation continued, there is no evidence of any causal relationship between the pattern or practice relied upon and the personality disorder referred to. Thus in two respects, both critical to support of the judgment on a continuing violation theory, the court's findings of fact are unsupportable.

Since there is no evidence showing either an instance of disparate treatment within 180 days of filing, or a pattern and practice of discrimination extending into the statutory 180-day period, IT&T was entitled to a judgment in its favor as a matter of law. That being so

---

NOTE 6 — (*Continued*)

Corp. of America, 75 F.R.D. 511 (D. Del. 1977); *see also* United Airlines, Inc. v. Evans, *supra*, 431 U.S. at 558 n.10; Schlei & Grossman, *Employment Discrimination Law*, 254 (Supp. 1979).

there is no occasion to consider other assignments of error relied upon by the appellant.[7] The judgment appealed from will be reversed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

---

7 These include the contentions that the court improperly relied upon a consent decree to which IT&T is a party in another action, and that it improperly considered a post-charge promotion of Jewett as evidence of job availability and failure to promote in the actionable period

Volume 4 Page No. 322

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARTHA JEVETT,

Plaintiff,

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORP.,

Defendant.

The Honorable Herbert J. Stern

Civil No. 76-0759

TRANSCRIPT OF PROCEEDINGS

OPINION

Newark, New Jersey
April 22, 1980

BEFORE:

Appearances:

JOYCE M. USISKIN, ESQ.,
Attorney for the Plaintiff.

CARPENTER, BENNETT & MORRISSEY, ESQS.,
BY: THOMAS L. MORRISSEY, ESQ., and
RUDY B. COLEMAN, ESQ.,
Attorneys for the Defendant.

PURSUANT TO SECTION 753 TITLE 28 UNITED STATES CODE THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE RECORD AS TAKEN STENOGRAPHICALLY IN THE ABOVE ENTITLED PROCEEDINGS.

JACQUELINE AUGUSTO

Reported by:
Jacqueline Augusto, CSR.
Michael Dillon, CSR
Janet Herczeg, CSR

THE COURT: Please, I'm not going to permit any rebuttal. I mean, this is the deposition of your own client. You should be imminently aware of that.

You've had your client on the stand. You had a complete opportunity --

MS. USISKIN: That's true, just to refresh my recollection.

THE COURT: Well, I mean, if you were following along with me, if there was anything else you wanted, you could have asked for it and she's testified.

Anything further?

MS. USISKIN: No.

THE COURT: Both sides rest?

I don't think there's any need for final argument. Does either side think so?

MR. MORRISSEY: I have no desire to supplement my argument. I think I've covered it on my motion at the end of the plaintiff's case. I'm renewing that argument.

MS. USISKIN: I will renew my opener and waive final argument.

THE COURT: Your opener? All right. Don't throw any chips at me, though.

This is a very interesting case. I have no doubt in my mind that the genesis of this case lies in the fact this plaintiff could not get along with Mr. Kielty and

Mr. Kielty could not get along with this plaintiff. There isn't the remotest doubt in my mind that had Mr. Kielty seen fit to give her a 6 or $700 raise back in 1973, this case would never have originated. That is not to say that the plaintiff has not been the victim of sex discrimination. It is merely to say that she would never have gone to court about it.

Now, who is this plaintiff? There is no doubt in my mind after having listened to her, studied her personnel records, entire work history at ITT, this is a completely dedicated employee to ITT. Even while she is suing ITT, she refers to this company in the most lovely terms, our product, our company, our line, we have this problem, we met it this way. It's never me against it, I against they. Even on this witness stand she identifies deeply and emotionally with this company.

No one listening to this testimony and watching her, as I have done, has the slightest doubt about it. This is not the enemy of ITT and that is only what is reasonable. This is a woman who has devoted the largest portion of her whole life to this company, nearly forty years.

The judge is given an almost impossible task going back and reconstructing what occurred in the emotional entanglements between people back in 1971, '2, '3, because that's when this case had its genesis.

The second factor about this plaintiff, I've listened to this plaintiff. This plaintiff is an articulate, intelligent woman and there isn't the slightest doubt in my mind that if she were a man instead of a woman, she would have gone much farther at ITT.

and J

No employee of a major company like ITT with that kind of dedication, that kind of ability, would have remained, in ITT terms, a grade 7 or an 8 or even, I think, a 10.

Now, I am confident that by 1971 she did, in fact, have personality problems. But what does that born of? There are documents, particularly, an exhibit introduced this morning, plaintiff's Exhibit 3y, which is a memorandum prepared by Mr. Recchia which demonstrates that it cannot be said that this was a plaintiff of ITT who had no ambition for advancement during her nearly 40 years of service with ITT. It cannot be said that she did not seek promotions. This document prepared by a supervisor mindful of an EEOC complaint states that in several portions that over the years she had repeatedly requested and demanded promotions and greater responsibility, and this is consistent with everything that I saw displayed on the witness stand.

Well, what happens to someone after 20 or 30 years of dedication service? Not 40, because by 1971, it was nearly 30, not yet nearly 40. What happens in 1971 when you worked at a place since 1943 and you see a 27 or a 28 year old brought in and promoted into a position when you worked in a compnay longer than that individual has been on this earth? It is not unusual, it is not unexpected that there should be a clash of personality. I find to be the fact that all of the plaintiff's efforts in the area of sex discrimination

originated due to her dissatisfaction with the interface between herself and Kielty. I think she would have even been prepared to accept the fact that Kielty had been promoted into that position or hired in to that position instead of her, because I do find it to be a fact that at that time she did not regard herself as being qualified for that position. She said that on the witness stand before me several weeks ago. She said that in the deposition testimony which Mr. Morrissey had me read on the bench. But I think deep within her, she understood that something was wrong and when, thereafter, she didn't get the kind of raises she thought she should, the whole thing began to disintegrate and so within a matter of a month or two, I believe it was in July or August of 1973 after Kielty made her the only employee within his aegis who did not get a raise and denied her six or seven hundred dollar raise, the plaintiff became very interested in the cause of women's rights and wanted to take a seminar and that you denied her, then everything began to fall apart. The fact remains that up until 1971, all of her performance ratings are quite good. Some of them are quite outstanding, as Mr. Lehman, the man in charge two levels above her, testified on the stand when shown the last rating given by Mr. France.

This is a curious combination. There is no doubt in my mind that the plaintiff in this case would have gone

much farther in this company had she been a man with the same talent, the same dedication. There would have been no need for this woman to have applied for a specific position. The records of the other men who testified, their experiences, they climbed out from clerical positions, blue collar jobs, union positions as they put it, which, I think, means hourly workers under a union contract, management, intelligent management at ITT and management is clearly intelligent there, such men out for promotional opportunities. Obviously interested in maximizing the human stockpile within ITT for the benefit of ITT, as well as for those individuals.

Now, of course, this is a period that I speak about, now, well beyond the statute that wasn't even a statute then. Indeed, that's why the congress had to pass a statute, precisely because of the broad based experience throughout American history that significant portion of the work force was not being used in its capacity with intended hardships, not merely to the individual, but to the firms themselves.

Why summarily scrap 60 percent of the work force or utilize them beneath their potential simply because they wear a skirt instead of a pair of pants? But this is not an actionable period and nothing that occurred prior to May 15th, 1973, is an actionable period and Kiely got the job in 1971, not 1973. If she had filed then, this Court might well have decided that 30 years of experience in ITT is more than any number of degrees in the hands of a 27 or 28-year-old. But that's not this case any longer and I don't think counsel disputes.

Nonetheless, I think the law still is that even though the prior period is not actionable any longer, where you deal with a continuing violation, it is appropriate to take account of the prior transactions as they spill over into the actionable period.

I find it to be a fact that the plaintiff in this case was difficult and harassable during the actionable period, and I find it to be the fact that in large measure, those difficulties and harassability were caused by her perceived, correctly perceived, notion that she had been treated unfairly.

I find it further to be the fact that during the actionable period, she was not properly graded, not merely because she was worth more than, but because she was worth more for years; that this had made her sour and difficult to

get along with, is not unreasonable under the circumstances. A few amongst us can preserve equanimity and a pleasant facade when one perceives and particularly perceives correctly that one is not being used to one's full potential for mindless and improper reasons.

Difficult she was, but her difficulties and her manifestations of them had been exacerbated by what she had to contend with.

Plaintiff, in this case, has offered absolutely no evidence as to what position she should have been put in on May 15th, 1973. That's correct, isn't it, ma'am?

MS. USISKIN: Yes.

THE COURT: Kielty's job was not open. Kielty was in it and I could not award her, even if I cared to, Kielty's job in 1971 because that is foreclosed to me. Isn't it, ma'am?

MS. USISKIN: Yes.

THE COURT: From 1973 on, there is no evidence in this record as to what job availability, what I could award her. What was open? I do not think I can simply fashion a job.

Yes?

MR. MORRISSEY: That 180 days is '74, not '73.

THE COURT: Did I keep saying '73? You're correct. I meant May 15, '74.

But this much I can fairly say: I find it to be the fact that after ITT found that a charge had been filed and after ITT attempted to ameliorate it, ITT made her a 10. I find it to be the fact that ITT could have made her a 10 on May 15, 1974; that within that vast organization there was the ability to take an employee with this many years of service of this much talent and make her a 10. I don't understand that. I cannot find. I don't know what to find beyond that. I've been offered absolutely nothing to go by.

I think my colloquy with plaintiff's counsel this morning demonstrates that. Even I will recognize making her a 10 in 1974, and I will cast it back to the full time, back two years, back pay purposes, for I feel that she should have had it. Even then -- even that, I strain. I do so because of another case which says, where the law is clear, one has been injured and very difficult to fix the exact amount of damages.

Nonetheless, a job for the Court is simply not to walk away but to fix damages.

The ironic thing about this and one of the incidents of discrimination, not just discrimination practiced deliberately and purposely, but the kind of discrimination that we grow up believing is the right way, 1943, 1953, 1960, the prevailing epic within the community, not just the business community, but all the communities was to expect

nothing else. Not just the man expected to treat the woman that way, but the woman expected to be treated that way.

The ironic thing about this is I think this plaintiff never would have filed suit at all if she had gotten a raise in 1973 from Mr. Kielty. It was just too much. Not only was she doomed and destined to remain always in the same level, not only was a man with less years than she had, years of service, promoted in over, but that man told her that because, in his words, on her rating sheet her job wasn't broad enough to justify it. She wasn't going to get a raise.

Well, as I say, if she had filed earlier when Kielty was appointed, it would have been an interesting question. I think that question is foreclosed to me now. Not

end k2

I don't have to address the question of betrayal of the trust of ITT by handing out the documents, but nonetheless, the record is clear and complete. I am not at all certain that the employer of such a case has any right to retaliate. An employee owes an employer a duty of confidentiality, faithfulness, but it owes an employer no duty to conceal or to put it more particularly, not to reveal to the United States Government evidence of violations of statutes, if there be any. I am not at all certain that an employee can be punished for alerting the EEOC that there is illegality within the company. As a matter of fact, I'm fairly certain that such an employee cannot.

A frivolous charge would be one thing. A malicious charge would be one thing. A charge of bad faith may be one thing, but I think it would be void, totally void, against public policy for a company to punish an employee for bringing that company's wrongdoing to the attention of the United States Government, particularly whereas in the case of Miss St. Pierre. Miss St. Pierre was given somewhere in the neighborhood of $15,000 in damages and whereas here, I find that there has, in fact, been sexual discrimination.

MR. MORRISSEY: I object to that comment on this record because Miss St. Pierre was not given any $15,000 in damages. What she was given was a settlement without admission of liability at any time in order to save the cost

of a litigation which was projected in a nebulous undefined class which we couldn't even get defined in this Court and didn't want to face expenses. That's why she got the $15,000,not because this company felt that they violated any duty to that woman at any time.

THE COURT: I will forgive the interruption of the ruling of the Court. I will even forgive your finger poke at me. I will even forgive you the fact that you demonstrated with me that you were forced to settle the case because of some lack of effort on my part.

MR. MORRISSEY: That is not what I said.

THE COURT: You said you couldn't get the class defined.

MR. MORRISSEY: And I went on to say that the reason that money was paid was not on the basis of any sense of guilt or obligation or duty. It was paid under a decree without admission of liability for the single reason that the company was faced with very expensive litigation costs.

THE COURT: That may be, Mr. Morrissey.

MR. MORRISSEY: And, by the way, sir, I didn't point at you at all. I was pointing at my pad.

THE COURT: Mr. Morrissey, I am not seeking picking on you. I am not in the habit of being interrupted while trying to make oral ruling from the bench.

MR. MORRISSEY: I apologize. I thought your

Honor was through.

THE COURT: Well, I'm not through, but I will be glad to ascertain what you have just said. I have said to you that in my judgment, the employee may not be disciplined for making a non-frivolous complaint to a public agency concerning alleged wrongdoing of that employee's employer. Whatever the motivation is of ITT within settling the case, it has certainly lost the power to now contend that the action of the equal employment opportunity commission against ITT is frivolous. I have read the consent decree. It was a case assigned to me. A committee has had to be established at ITT to take certain action, etc., and so forth. If necessary, I will embody that decree, consent decree as part of the judgment. I don't think it's necessary because I don't think the issue was even before me, but nonetheless, I want to be complete in my findings.

The fact of the matter is that even if one could find, which I cannot, that any of ITT employment decisions were based on its conclusion that Miss Jewett had violated some notion of trust, which I do not find, for ITT knew nothing about that until a period after the period I'm addressing. All I'm saying is even if I could make such a finding, which I can't, I do not believe that she could be disciplined for such an action. At least not in the face of an action which appears to be not frivolous. It may well be that ITT

had other reasons to settle the case. Its reasons must remain its own. But once it did, and once it entered into a consent decree and once it agreed to certain affirmative kind of action, whatever its reasons were, it can hardly take action to penalize an employee brought into motion the steps which led to that consent decree and that affirmative action. That would be retaliation. An employee owes the highest degree of loyalty and confidentiality to an employer, but not across the line of illegality or impropriety. No employer may require an employee to remain silent if that employee has knowledge that that employer has violated the law. The amount of damages we have not had before us, but, I take it, that would be an easy matter to compute.

I think we had discussion on that on the record several weeks ago before I became ill. I will award this plaintiff a Grade 10 effective two years before May 15, 1974. It should be a mathematical computation.

Am I incorrect in that?

MR. MORRISSEY: Two years before May 15, or two years before the filing of the charge?

THE COURT: Two years before the filing of the charge.

MR. MORRISSEY: That's November 11, '74.

THE COURT: All right. I shall use the wrong date, but I am properly corrected. Two years before November 11th. Can I rely on counsel to get up the actual figures?

MR. MORRISSEY: No problem.

THE COURT: Counsel fees will be awarded.

I don't even think it is discretionary to do that. It would require unusual circumstances not to. I find no unusual circumstances here.

Counsel may submit an application for counsel fees consistent with the Lindy line of cases. And Lindy has given birth to a great many line of cases, New Jersey Circuit.

You'll have to prepare an Affidavit. Break it down.

Mr. Morrissey, if you disagree with the hours you'd be entitled to discovery on it, if you wish. I want a

complete application so that everything is in order.

MS. USISKIN: If it please the Court, may I ask will Mr. Morrissey submit his hours, too, by comparison?

THE COURT: No. Not yet. Under what?

MS. USISKIN: There's a case --

THE COURT: Kyriazi?

MS. USISKIN: No.

THE COURT: The Texas case?

MS. USISKIN: Is it the Texas case? There is a case in which it was done.

THE COURT: Southern Bell?

MS. USISKIN: I think so.

THE COURT: That's only if there is a dispute in the amount of hours.

MR. MORRISSEY: I'm sorry?

THE COURT: Forgive me, Mr. Morrissey. That's only if there's a dispute as to the amount of your hours. Is that right?

MS. USISKIN: That's correct.

THE COURT: You prepare your Affidavit. If there's no dispute about the number of hours you claim, then there won't be any need to have a trial on that issue. I'm not going to let you discover Mr. Morrissey's hours just to find out how many hours to claim for yourselves.

Fair enough, Mr. Morrissey, at least on that

point?

MR. MORRISSEY: I'm not going to address it at this time, your Honor, unless it arises.

THE COURT: All right. Anything else?

MS. USISKIN: No, sir.

THE COURT: Anything else?

MR. MORRISSEY: No.

THE COURT: Have a nice day.

(Court adjourned.)

TABLE II

ITT Defense Communications Division
492 River Road
Nutley, New Jersey

| | 1966* | 1968 | 1969 | 1970 | 1971 | 1972 | 1973 | 1974 | 1975 |
|---|---|---|---|---|---|---|---|---|---|
| Total Employees | 4031 | 1342 | 1081 | 1220 | 1296 | 825 | 830 | 917 | 855 |
| Total Women Employees | 850 | 255 | 205 | 234 | 241 | 132 | 130 | 136 | 145 |
| Percentage of Employees who are Women | 21.0% | 19.0% | 19.0% | 19.2% | 18.6% | 16.0% | 15.7% | 14.8% | 17.0% |
| Total Officials and Managers | 376 | 167 | 139 | 159 | 211 | 177 | 165 | 170 | 181 |
| Women Officials and Managers | 1 | 0 | 0 | 0 | 3 | 2 | 2 | 2 | 2 |
| Percentage of Women Officials and Managers | 0.27% | 0 | 0 | 0 | 1.4% | 1.1% | 1.2% | 1.2% | 1.1% |

* ITT Facility at 500 Washington Avenue, Nutley includes Nutley, Clifton and Paramus units.

Note: Information extracted from Exhibit P-30 (522a-531a)

# United States Court of Appeals

## FOR THE THIRD CIRCUIT

No. 80-2371

JEWETT, Martha, individually and on behalf of all others persons similarly situated

vs.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

Appellant

(D. C. Civil No. 74-0739)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE — DISTRICT OF NEW JERSEY

Present: SEITZ, Chief Judge and ALDISERT and GIBBONS, Circuit Judges

### JUDGMENT

This cause came on to be heard on the record from the United States District Court for the — District of New Jersey and was argued by counsel on April 21, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 31, 1980, be, and the same is hereby reversed consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Sally Frame
Clerk

June 9, 1981

Certified as a true copy and issued in lieu of a formal mandate on June 30, 1981.

Test:

Clerk, United States Court of Appeals for the Third Circuit

SALLY MRVOS
CLERK

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

TELEPHONE
215-597-2995

August 7, 1981

Re: Jewett, Martha, etc. vs. International Telephone and Telegraph Corporation, Appellant

No. 80-2371

Gentlemen:

Enclosed herewith is conformed copy of order entered by the Court today in the above-entitled case which reads as follows:

> " The foregoing motion to amend judgment to exclude taxation of costs is granted to the extent that the appellant will be awarded fifty per cent of the cost of printing the appellant's brief and appendix, but denied in all other respects."

The fifty per cent of costs will be added to the mandate in due course and you will be advised.

Very truly yours,

Sally Mrvos

Sally Mrvos, Clerk

mef:ts
Enclosure
Copies to all parties

UNITED STA[illegible] COURT OF APPEALS FOR THE [illegible]RD CIRCUIT

July 17, 1981

No. 80-2371

JEWETT, Martha, individually and on behalf of all other persons similarly situated

vs.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,
Appellant

Present: SEITZ, Chief Judge and ALDISERT and GIBBONS, Circuit Judges

1. Motion by Appellee, to Amend the Judgment to exclude the taxation of costs.

2. For your information the Opinion was filed and Judgment entered on June 8, 1981. See copy of Clerk's Order filed July 10, 1981.

in the above-entitled case. Any Answer which would be due by July 26, 1981 will be forwarded to you upon receipt of same.

Respectfully,

Clerk

enc.

bjr

---

The foregoing Motion is/are [illegible]

By the Court,

Dated: August 7, 1981

Judge

# Opposition

Office - Supreme Court
FILED
OCT 13 1981
ALEXANDER L. STEVAS
CLERK

No. 81-507

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

MARTHA JEWETT,

*Petitioner,*

—v.—

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

THOMAS L. MORRISSEY,
*Counsel for Respondent,*
744 Broad Street,
Newark, New Jersey 07102.
(201) 622-7711

CARPENTER, BENNETT & MORRISSEY,
*Attorneys for Respondent.*

ROSEMARY A. HALL,
*On the Brief.*

## PARTIES TO THE PROCEEDING

Petitioner: Martha H. Jewett

Respondent: International Telephone and Telegraph Corporation*

---

* Following is a list naming all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of respondent International Telephone and Telegraph Corporation:

Abbey Life Insurance Company of Canada,
Austral Standard Cables Pty Limited,
Bell Zaire Scarl,
Cannon/JAE Ltd.,
Claude Publicite SA,
Coast Cable, Inc.,
Compagnie Financiere CGCT SA,
Compagnie Generale De Constructions Telephoniques (CGCT),
Compagnie Generale De Constructions Telephoniques-Maroc (CGCT MAROC SA),
Compania Internacional De Telecommunicacion Y Electronica SA,
Comptroit D'Electricite Paris-Lyon (Copaly) SA,
Cuban American Telephone and Telegraph Company,
Daewood-ITT Engineered Products Ltd.,
Electronic Components Associates Pte. Ltd.,
Establissements Henri Pouyet A.C.E.T.P.,
Fabrica De Equipo De Telefonna SA (FETSA),
Far East Switches Ltd.,
Federal Electric Alireza Ltd.,
Flygt France SA,
Friedrich Grohe Armaturenfabrik GMBH & Co.,
G C Illumination SPA,
Great Eastern Insurance Company,
Grohe Handelsgesellschaft MBH,
Grohe Thermostat GMBH,
Guia Ca De Publicidad,
Guias Y Publicidad De Chile SA,
Hartex, Inc.,
Hartford Accident and Indemnity Company,
Hartford Do Brasil LTDA.,
Hartford Fire Insurance Company,
Isobras Industria E Comercio LTDA.,
Isostat S.A. (France),
ITT Composants Et Instruments,
ITT Comunicaciones Mundiales SA (Chile),
ITT Controls France S.A.R.L.,
ITT Data Systems France SA,
ITT Maroc Limited,

*(footnote continued on next page)*

ITT Niles Co. Inc.,
ITT Philippines, Incorporated,
ITT Versicherungsdienst GMBH & Co. KG,
ITT World Directories Inc.,
ITT World Directories (U.K.) Ltd,
Jeanrenaud Italia SRL,
Koni France SARL,
Laboratoire Central De Telecommunications (LCT),
Lasignalisation SA,
London-Canada Insurance Company,
Maister Directories PTY Ltd,
Marconi Espanola S.A.,
Metalicht, B.V.,
Munchener Awtozubehor GMBH,
Oy Suomalainen ITT AB,
P.E.A. Industrial S.A. de C.V.,
Piped TV (West Cumberland) LTD,
Press Wireless Uruguaya LTDA,
Promedia SA,
Publimedia BV,
Qume (U.K.) Limited,
RAAK Cetek,
Schmoele & Comp.,
Sheraton Hotels France SA,
Sistemas De Bombeo ITT SA De CV,
Sociedad Industrial De Electromagnetismo SARL,
Sociedad Immobiliara San Cristobal SA,
Societe Algerienne De Constructions Telephonique,
Societe Civile Immobilierer Le Loubet,
Societe D'Exploitaction Des Establissements Henri Pouyet SA,
Societe De Materiel Montparnasse Sodevan & Cie SA,
Societe Immobiliere Hoteleliere Montarnasse SA,
Southwest Producing Company of Canada Limited,
Standard Electric S.A. (Spain),
Standard Elektrik Ve Telekomunikasyon Limited Sirketi,
Standard Elektrik Lorenz AG (SEL),
Standard Electric Alireza Limited (SEAL),
Standard Telephones and Cables Limited,
Standard Telefon OG Kabelfabrik A S (STK),
Stavanger Elektro Engrosforretning A/S,
Suez Electronics S.A.E.,
Taiwan International Standard Electronics, Ltd.,
Teleannons Ab,
Teleradio Brasileira LTD,
Transatlantische Rueckversicherungs-AG,
Twin City Fire Insurance Company,
Wakefield Fortune (Aldwych) LTD,
Washington Sheraton Corporation,
Winifrede Company.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINION BELOW | 1 |
| COUNTERSTATEMENT OF THE CASE | 2 |
| A. Procedural History | 2 |
| B. Facts | 3 |
| 1. July 1943 to May 15, 1974—Before the Actionable Period | 3 |
| 2. May 15, 1974 to November 11, 1974—The Actionable Period | 4 |
| 3. Post-Charge Events | 7 |
| REASONS FOR DENYING THE WRIT: | |
| A. The holding of the court of appeals that petitioner did not make out a *prima facie* case of discrimination is correct and not in conflict with that of any other court | 7 |
| 1. The court of appeals decision | 8 |
| 2. Petitioner's "statistical" evidence | 10 |
| 3. The continuing violation theory | 14 |
| B. Petitioner's request that the Court consider whether a consent decree in an EEOC action is admissible as evidence of discrimination in another action is unfounded and not properly before the Court | 14 |
| C. Petitioner has shown no valid reason for review and amendment of Rule 39 of the Federal Rules of Appellate Procedure | 15 |
| CONCLUSION | 17 |

PAGE

APPENDIX:

A. Opinion of the United States Court of Appeals .. 1a

B. Order of the United States Court of Appeals Amending Opinion ..... 9a

## TABLE OF AUTHORITIES

**Cases Cited** PAGE

*Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) ..... 16

*Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978) ..... 14

*Davis v. Califano*, 613 F.2d 957 (D.C. Cir. 1980) ....8, 12, 13

*EEOC v. United Virginia Bank*, 615 F.2d 147 (4th Cir. 1980) ..... 13

*Hazlewood School District v. United States*, 433 U.S. 299 (1977) .....7, 11, 13

*International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).....7, 9, 11

*Kunda v. Muhlenburg College*, 621 F.2d 532 (3d Cir. 1980) ..... 8

*Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) .....11, 12

*McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) 8

*Pack v. Energy Research & Development Administration*, 566 F.2d 1111 (9th Cir. 1977)..... 13

*Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980).....8, 9, 13

*Shehadeh v. Chesapeake & Potomac Telephone Co.*, 595 F.2d 711 (D.C. Cir. 1978) ..... 8

*United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) .....9, 10

**Statutes Cited**

Civil Rights Act of 1964,
§§ 701, *et seq.*, 42 U.S.C. §§ 2000e, *et seq.*..... 2
§ 706, 42 U.S.C. § 2000e-5 ..... 2

PAGE

Title 28
§ 1915 ..... 16

**Rules Cited**

Rules of the Supreme Court of the United States
46 ..... 15

Federal Rules of Appellate Procedure
24 ..... 16
39 ..... 15, 16

Federal Rules of Evidence
407 ..... 15
408 ..... 15

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

**No. 81-507**

---

MARTHA JEWETT,

*Petitioner,*

—v.—

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

## RESPONDENT'S BRIEF IN OPPOSITION

---

### Opinion Below

The opinion of the court of appeals is reported at 653 F.2d 89 (3d Cir. 1981). It appears in Appendices A and B to this brief.[1]

---

1 Petitioner's appendix contains the court of appeals' original opinion entered April 28, 1981, but does not include the Order Amending Opinion entered June 11, 1981.

## COUNTERSTATEMENT OF THE CASE

**Procedural History.**

Petitioner Martha Jewett filed a charge of sex discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as the "EEOC") on November 11, 1974.[2] The EEOC issued a notice of right to sue on February 3, 1976, and on April 26, 1976, petitioner commenced this action in the United States District Court for the District of New Jersey, alleging discrimination in training, promotion and wages, in violation of Title VII of the Civil Rights Act of 1964 (hereinafter referred to as "Title VII"), 42 U.S.C. §§ 2000e, *et seq.*

By order entered August 11, 1977, this action was consolidated with an action then pending between the EEOC and ITT Defense Communications Division. The EEOC action was thereafter settled by entry of a consent decree without admission of liability and without affecting the instant action, which was reserved for trial.

On April 22, 1980, a four-day non-jury trial concluded. The district court rendered its opinion and decision from the bench, holding that petitioner had been unlawfully denied promotion. Judgment in favor of petitioner was entered on July 31, 1980, and on August 27, 1980 respondent appealed therefrom to the United States Court of Appeals for the Third Circuit. Petitioner did not cross-appeal from the district court's denial of her other claims. On April 28, 1981, the court of appeals reversed and remanded for entry of judgment in defendant's favor, holding petitioner's proofs of discrimination insufficient as a matter of law.

---

2 Since petitioner filed her EEOC charge on November 11, 1974 and 42 U.S.C. § 2000e-5 requires such charge to be filed within 180 days of violation, the "actionable period" herein is May 15, 1974 to November 11, 1974.

## B. Facts.

### 1. July 1943 to May 15, 1974—Before the Actionable Period.

Petitioner was hired as a secretary by a former subsidiary of respondent on July 1, 1943. She held various secretarial and clerical positions until July 1959, when she began to supervise a pool of typists who typed government-contract proposal forms. In the fall of 1964 the program for which the pool was organized was phased out, and in lieu of layoff petitioner was assigned to the Manager of Personnel Employment as a personnel assistant.[3] Her duties included typing, keeping managers' logs, and assisting in the training of keypunch operators.

In January 1966, the ITT division in which petitioner was employed was phased out, and she was assigned transitional duties in its Personnel Department as a Placement Representative. Her placement activities, however, were confined to interviewing clerical-type help and keypunch operators, telling applicants about ITT, and giving them tests. She was not qualified to interview technical personnel or engineers.

In August 1967, petitioner was transferred to ITT Defense Communications Division as a personnel assistant in the Salary Administration section of the Personnel Department. Her job consisted of assisting in paperwork.

In 1969, Thomas Kielty was brought from another ITT program to assist the manager of compensation, Howard France, in compensation-analyst work. When France resigned in 1971, Kielty became petitioner's supervisor.[4]

---

3 This position was lower in grade than petitioner's previous job, but she did not suffer loss of pay.

4 Kielty had had job-analysis responsibilities in his previous job at ITT's Federal Electric Corporation (Camp Kilmer) Job Corps Program. He held a bachelor's degree in education and a master's degree in personnel work, and had also completed college courses in job evaluation and analysis. At Camp Kilmer, he was classified Specialist, Personnel (job grade 11), at an annual salary of $11,585.00, and upon

Petitioner made no inquiry during this period as to why Kielty, rather than she, was being trained in the Compensation-Analyst work of their department as successor to France. At trial, she acknowledged she did not consider herself as qualified as Kielty.

In December 1973, Kielty, then Manager of Compensation, informed petitioner that he could not in good conscience recommend her for a raise; that she was already well-compensated for the work she was doing. She was then receiving $11,500 per year.

**2. May 15, 1974 to November 11, 1974—The Actionable Period.**

Petitioner alleged only one incident of discriminatory conduct during the actionable 180-day period preceding the filing of her EEOC charge—that on July 3, 1974, she requested and was denied permission to attend a seminar. She was allowed to take a vacation day to attend the seminar, which she described as a round-table task force for female librarians. She was the only woman in attendance not from the library field.

Petitioner was fully aware of ITT's Educational Assistance and Tuition Reimbursement Programs, aimed at providing financial assistance and time off for courses "applicable to the employee's field of work." She was further aware that a number of other female employees had availed themselves of these programs and advanced to management positions in the process. Petitioner, however, made only two course requests during her long tenure with respondent. One was the librarian round-table; the other was a one-week management seminar at Cornell University in 1960, which she attended.

Petitioner's explanation of her failure to take further courses under these programs was terse and clear: "I thought my

---

his assignment to ITT Defense Communications Division, he was classified Compensation Analyst (job grade 12) at an annual salary of $12,000.

background and experience was enough for the work I was doing." Asked, "But didn't you see fit to take advantage of any of that?", she replied, "No, because other women have been promoted that don't have college degrees . . . . I also know women who have gotten promotions that don't have college degrees":

> "Question: But it is your firm conviction that the company should not weigh the college degree heavily when the considerations are a person with no college education and one who has it? You don't think they should weigh heavily in favor of the college person?
>
> "Answer: Not against thirty years' experience, Mr. Morrissey.
>
> "Question: Even though they have degrees in personnel and sociology and Bachelor's?
>
> "Answer: That's right.
>
> "Question: And Master's and took extension courses and all the rest?
>
> "Answer: Correct.
>
> "Question: That is your real grievance, isn't it?
>
> "Answer: Yes. I feel experience should count for something."[5]

Shortly after the Social Responsibility Round Table for Librarians, petitioner had her annual performance appraisal, which, while generally complimentary, made reference to occasions "when actions have been clouded by emotion and as a result have been less than satisfactory" and to the fact that the

---

5 In a 1974 memorandum, petitioner complained that another woman with fewer years of service than she, but with a college degree, had a better position. This complaint was reiterated in her 1976 deposition read at trial, "They seem to equate everything with a college degree and that I will admit I don't have, but I do have a degree in ITT experience and there is no substitute for experience."

quality of her work could be improved. Also mentioned was a tendency to complete work her own way, without listening to directions.

On the same day, petitioner received instruction from her supervisor, Kielty, that while he was on vacation all paperwork requiring the divisional president's signature was to be processed through the Employment Supervisor. Petitioner willfully violated that order, and went so far as to send a note to the president criticizing Kielty's directions to her.

Later that month, petitioner wrote Kielty a memorandum in response to his evaluation of her performance, reiterating her insistence that she be permitted to do things her own way. She annexed thereto a copy of a page of a book on management techniques, with the phrase, "But he lets the worker do the work in the way he thinks best," underscored. On deposition, petitioner confirmed her belief that she was privileged to do things her own way, going so far as to state she had a right to violate specific instructions from her supervisor so long as she felt her way of doing things was better.[6]

Petitioner's obstreperousness later reached the point of blatant violation of trust. Throughout this period, her duties included the updating and filing of personnel and salary records, records which she knew were highly confidential, not to be disclosed to anyone except company or government officials, and then only under certain prescribed procedures.

Petitioner admitted at trial, however, that in the fall of 1974, in direct and knowing violation of respondent's confidentiality rule, she photocopied the "Position History, Performance and Salary Review" cards of three male employees and turned them over to a former employee of respondent, Pauline St. Pierre, who had telephoned her and requested them.

---

6 The district court perceptively concluded: "I have no doubt in my mind that the genesis of this case lies in the fact that plaintiff could not get along with Mr. Kielty and Mr. Kielty could not get along with this plaintiff" (A11-12).

**3. Post-Charge Events.**

On November 25, 1974, petitioner was called into a meeting with the Director of Personnel at which there was a long discussion about her salary and job classification. She was told that her job classification was about to be downgraded from a job grade nine to a seven, but that she would not suffer any reduction in pay as a result; that to the contrary, she would receive a salary increase. Not until November 27, 1974—two days after this meeting—did petitioner inform respondent that on November 11, 1974, she had filed a charge of discrimination with the EEOC. Asked why she didn't tell them in the November 25, 1974 meeting, she replied that she "just didn't think it was the time to tell them."

Petitioner testified that the downgrade was not directed solely at her job, but was part of an ongoing study and regrading of jobs; that ITT was constantly effecting grade changes to remain competitive in the industry.

## REASONS FOR DENYING THE WRIT

The court of appeals decision is correct and not in conflict with any other court. It is a decision based on the facts of this case, and neither impacts the law nor affects future actions. No important issues warranting review by this Court are presented.

### A. The holding of the court of appeals that petitioner did not make out a *prima facie* case of discrimination is correct and not in conflict with that of any other court.

Petitioner contends that the holding of the court of appeals that she failed to establish a *prima facie* case of discrimination is in conflict with decisions of this Court,[7] the United States

---

7 *Hazlewood School District v. United States*, 433 U.S. 299 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Court of Appeals for the District of Columbia,[8] and the United States Court of Appeals for the Ninth Circuit,[9] in that the court of appeals herein "failed to give cognizance to" petitioner's statistical proofs, and failed to find existence of a continuing violation of Title VII. Review of the decisions cited by petitioner, however, reveals no such conflict; all three courts of appeals applied identical legal precepts, in accord with prior decisions of this Court. The Third Circuit's decision herein is in fact distinguished by the dearth of statistical or other evidence of discrimination against petitioner or any other female employee, and not by the law applied.

**1. The court of appeals decision.**

The court of appeals herein did no more than apply settled law to the facts of this case. It first stated that petitioner could have made a *prima facie* case by either of two methods: by showing that, within the actionable period, she was denied promotion to a position she sought, for which she was qualified, and to which a less qualified man was appointed, *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), or by showing that a pattern or practice of discrimination prior to the actionable period continued to disadvantage her in promotion during the actionable period. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980); *Shehadeh v. Chesapeake & Potomac Telephone Co.*, 595 F.2d 711 (D.C. Cir. 1978).

The court then correctly concluded that petitioner had not presented a case in the *McDonnell-Douglas Corp. v. Green, supra*, mode, in that she failed to identify a single position that she was discriminatorily denied. In the words of the district

---

8 *Davis v. Califano*, 615 F.2d 957 (D.C. Cir. 1980).

9 *Reed v. Lockheed Aircraft Corporation*, 613 F.2d 757 (9th Cir. 1980).

court, she "offered absolutely no evidence as to what position she should have been put in" (A18).[10]

The court thus turned to the theory of liability relied upon by the district court: the existence of a system-wide pattern and practice of discrimination (RA3-4). In analyzing this theory, the court of appeals again applied well-established and unassailably correct precepts. It first stated, as this Court did in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977), that a plaintiff alleging a pattern and practice must prove, by a preponderance of the evidence, that discrimination against the class of which he or she is a member was the company's "standard operating procedure." It further noted that a plaintiff injured by a discriminatory practice before the actionable period may nonetheless recover if the offending practice was ongoing and continued during the actionable period (RA4), in accord with this Court's decision in *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), and the very Ninth Circuit decision, *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980), cited by petitioner as in conflict with the decision below.

In applying these standards to the record, the court of appeals correctly concluded that petitioner had not proved a pattern and practice case. It first noted that the only "discriminatory" incident mentioned in the district court decision was the promotion of a male in 1971—three years before the actionable period—into a position for which petitioner admitted she was not qualified and for which the district court found

---

10 The only question with respect to which any evidence was presented at trial was that of Manager of Compensation, filled by Thomas Kielty in 1971. Aside from the fact that this was three years before the actionable period herein, petitioner acknowledged at trial that she did not consider herself as qualified as Kielty and that she had no reason to believe her superior lacked objectivity or fairness in selecting Kielty for the job. Therefore, neither the district court nor the court of appeals found the appointment of Kielty to be discriminatory.

she was not qualified. It thus concluded that petitioner had not proved a pattern of discrimination through specific example.

The court then considered petitioner's claim that the entire promotional system at ITT operated to her disadvantage because men were offered promotions without need of application, and women were not. It concluded that petitioner had not proved this claim, noting two defects in her evidence. First, although three male employees testified that they had been offered promotions without application, no evidence whatsoever was presented to show that women were not similarly treated. Second, even assuming such pattern had existed at one time, there was no finding by the district court, and no evidence in the record, that it operated to petitioner's disadvantage during the actionable period. The court of appeals rejected the district court's finding that, due to prior discrimination, petitioner developed a personality disorder which adversely affected her chances of promotion during the relevant time frame. The court reasoned that even if it had been shown that there was prior discrimination—and it was not—and this discrimination caused petitioner's personality problems, personality conflicts resulting therefrom would be an effect of prior discrimination, not a continuation of the discrimination itself. *See United Airlines, Inc. v. Evans*, 434 U.S. 553 (1977).

**2. Petitioner's "statistical" evidence.**

Petitioner contends that the failure of the court of appeals to address her "statistical evidence" was error that conflicts with decisions of this Court and the District of Columbia and Ninth Circuits. This contention is totally lacking in substance. The court of appeals was, of course, under no obligation to discuss in its decision all evidence in the record. It was justified in not including petitioner's statistical evidence, because the district court neither relied upon it nor made factual findings with respect to it, and, more significantly, because it was devoid of probative value.

Petitioner's "statistical" case consisted solely of lists of the numbers of male and female employees in various job classifications, introduced into evidence without elaboration or analysis. Although the discrimination alleged was failure to promote into upper-level management and executive positions, no attempt was made to analyze employee flow, to compare promotional rates of comparably qualified men and women, to show how many women would have been expected to be promoted in gender-neutral circumstances, to show that women qualified for promotion into upper-management were available, or even to show that any such positions were available. In short, petitioner relied solely on a showing of unequal numbers of men and women. The court of appeals' implicit conclusion that this alone did not constitute a *prima facie* case of discrimination is in conflict with none of the decisions relied upon by petitioner.

This Court's decision in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), was based not on mere comparisons of minority and Caucasian employees, but on gross, long-standing disparities between employee and labor-pool compositions during a period of large employee turnover, which disparities were bolstered by evidence of more than forty specific instances of discrimination. Even more significant, however, is the fact that the jobs there in issue—truck driver positions—required few if any special qualifications, making evidence as to the availability of qualified minority employees unnecessary. The Court cautioned that the probative value of statistics in future actions would depend on all of the surrounding facts and circumstances of each case. 431 U.S. at 340.

In *Hazlewood School District v. United States,* 433 U.S. 299 (1977), the Court was presented with a case more similar to the present one, alleging discrimination in the hiring of teachers. The Court made clear, as had been suggested previously in *Teamsters* and *Mayor of Philadelphia v. Educational Equality*

*League*, 415 U.S. 605 (1974),[11] that statistical evidence of discrimination in professional positions must include figures as to the availability of qualified minority applicants:

> In Teamsters, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general area-wide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

433 U.S. at 308 n. 13.

The contrast between the statistical proofs herein and those in *Davis v. Califano*, 615 F.2d 957 (D.C. Cir. 1980), also alleged by petitioner to be in conflict, is even more extreme. The plaintiff in that case, a female scientist alleging discriminatory denial of promotion, had presented detailed statistical data with respect to a homogeneous group of professionals showing, *inter alia*, disparity in grade and salary distribution and promotion rates among male and female employees with comparable educational backgrounds. In holding that plaintiff had made a *prima facie* case and remanding for trial, the court made particular note of the fact that an appropriate labor pool, consisting of individuals possessing the "minimum neces-

---

11 The Court held there that the Third Circuit had erred in holding bare numerical comparisons of black and Caucasian school board members evidential of discrimination: "Statistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination . . . . But the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning in the context of this case. Respondents do not challenge the qualifications for service on the Panel set out in the charter, . . . . Accordingly, this is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded." 415 U.S. at 620.

sary qualifications for promotion," had been utilized. 613 F.2d at 964. Consideration of the availability of qualified women, the court stated, was mandated by this Court's decision in *Hazlewood School District v. United States, supra,* 433 U.S. at 308.

The rule in the Ninth Circuit, the final circuit alleged by petitioner to be in conflict with the court of appeals herein, is also in accord. The decision relied upon by petitioner, *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980), was a mere reversal of summary judgment and remand for trial, in which the court noted that the plaintiff was free to establish a *prima facie* case through statistical evidence such as that presented in *Davis v. Califano, supra.* However, in another decision, not cited by petitioner, the Ninth Circuit considered and rejected statistical evidence similar to that herein:

> We agree with the district court that appellant's statistical evidence failed to establish a *prima facie* case of discrimination. Appellant proved that at a given date at the NVOO facility, approximately 98% of the employees at grades GS-11 and above were males, whereas 95% of the lower grade professionals were females. No evidence whatsoever was introduced to demonstrate that the lower grade professional women were qualified to occupy the higher positions or that there elsewhere existed a pool of qualified women applicants.

*Pack v. Energy Research & Development Administration,* 566 F.2d 1111, 1113 (9th Cir. 1977).[12]

In sum, petitioner has pointed to no case holding that, standing alone, disparate numbers of female and male employees in a given workforce constitute a *prima facie* case of discrimination. Her request of this Court is not to resolve a conflict among the circuits, but to reverse completely this

---

12 To the same effect is the Fourth Circuit's decision in *EEOC v. United Virginia Bank,* 615 F.2d 147 (4th Cir. 1980).

Court's own decisions and consistent decisions of the courts of appeals.

**3. The continuing violation theory.**

Petitioner's contention that the court of appeals' finding that there was no continuing violation herein warrants review by this Court requires little discussion. Petitioner cites *Clark v. Olinkraft, Inc.*, 566 F.2d 1219 (5th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978), a case with which respondent has no quarrel. It holds that perpetuation of a promotional system which continually operates to hold protected individuals in low-level jobs constitutes a continuing violation (Pb15). The Third Circuit in the instant case fully concurred with that proposition. Its finding of no discrimination was based not on rejection of petitioner's statement of the law, but, rather, on petitioner's failure to present evidence proving that respondent's promotional system at any time operated to the disadvantage of women. Since there was no proof of a violation to begin with, perforce there could be no continuation thereof.

**B. Petitioner's request that the Court consider whether a consent decree in an EEOC action is admissible as evidence of discrimination in another action is unfounded and not properly before the Court.**

Petitioner next contends that the court of appeals erred in "rejecting by implication" a consent decree entered into in a previously concluded action between respondent and the EEOC. Petitioner argues that the consent decree should have been considered as evidence of the fact that it was feasible for respondent to take affirmative action to the end of promoting females into managerial positions during the actionable period herein.

The impropriety and irrelevance of this contention are obvious. At no time prior to filing her petition herein did petitioner suggest the consent decree was evidence of discrimination, of subsequent remedial actions, or of feasibility. She did not rely

on it at trial and did not proffer it as evidence; it was never made part of the record. The consent decree was, in fact, totally unconnected with this action until the district court referred to it in its oral decision (A21-24). Respondent objected to those references when made, and argued on appeal that the district court's discussion of the decree in terms which suggested that it was considered an admission of wrongdoing constituted reversible error. Because it reversed on other grounds, the court of appeals never ruled on this assignment of error.

Since petitioner did not proffer the consent decree, its admissibility under either Rule 407 or Rule 408 is irrelevant. It is noted, nonetheless, that acceptance of petitioner's contention—that agreement upon affirmative action in settlement of an EEOC action may be utilized in another individual case to show the employer was somehow culpable in not taking such affirmative action sooner—would contravene the purposes of both rules. It would deter voluntary amelioration of the status of minority employees, as well as voluntary resolution of employment discrimination charges—a primary goal of Congress in enactment of Title VII and creation of the EEOC.

### C. Petitioner has shown no valid reason for review and amendment of Rule 39 of the Federal Rules of Appellate Procedure.

Petitioner contends the Court should consider whether individuals identical to her—who receive findings of probable cause from the EEOC, prevail in the district court, and lose on appeal—should be uniformly excepted from taxation of costs on appeal under Rule 39 of the Federal Rules of Appellate Procedure. She asserts two bases for such limitation, neither of which is meritorious.

Petitioner first argues that appellees should not be subject to taxed costs because they are unable to proceed *in forma pauperis*. That is a patently erroneous statement of law. Indeed, had petitioner read Rule 46 of the Rules of this Court,

which she relies on in her petition, she would have found that it, like Rule 24 of the Federal Rules of Appellate Procedure and the statutory authorization for proceedings *in forma pauperis*, 28 U.S.C. § 1915, is applicable to all parties.

Petitioner next argues that the possibility of taxed costs has a "chilling effect" which deters plaintiffs from vindicating their rights. Assuming it is true, as petitioner suggests, that potential litigants consider the possibility of taxed costs on appeal before commencing suit, it would further have to be assumed that not just plaintiffs, and not just parties to employment discrimination actions, would be so affected. Thus, if it should be determined that potential taxation of costs does deter litigation, and if it should be further determined that such deterrence (despite its concomitant encouragement of amicable dispute resolution and discouragement of frivolous claims) is undesirable,[13] the remedy is total abolition of taxed costs, not adoption of the rule suggested by petitioner.

In sum, petitioner has shown no valid reason for this Court to consider her proposed limitation of Rule 39, and respondent respectfully submits there is none. Since the Rule at present neither compels nor prohibits an award of costs to any party, the courts can and do tailor their awards to the peculiar circumstances of each action, considering the closeness of the case, the financial capacity of the unsuccessful litigant, and any other pertinent factors.[14] If this practice is considered inadequate or undesirable, it would seem more appropriate to change it outside the context of litigation, by rule revision or statutory amendment.

---

13 This Court's decision in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), that unsuccessful plaintiffs in employment discrimination actions may, in proper circumstances, be required to pay the prevailing defendant's attorney's fees, suggests that deterrence of litigation is not always undesirable.

14 The court of appeals herein did in fact exercise its discretion under Rule 39 to petitioner's benefit. On motion by petitioner to exclude taxation of costs it reduced by one-half respondent's printing costs, the reasonableness of which was not contested.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS L. MORRISSEY,
*Counsel for Respondent.*

CARPENTER, BENNETT & MORRISSEY,
*Attorneys for Respondent.*

Dated: October 9, 1981.

# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2371

JEWETT, MARTHA,

*v.*

INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION,

*Appellant*

(D.C. Civil No. 76-0759)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued April 21, 1981

Before: SEITZ, *Chief Judge,*
ALDISERT and GIBBONS, *Circuit Judges*

(Filed June 8, 1981)

JOYCE M. USISKIN, ESQUIRE
(Argued)
One Palmer Square, Suite 402
Princeton, New Jersey 08540
*Attorney for Appellee*

THOMAS L. MORRISSEY, ESQUIRE
(Argued)
ROSEMARY A. HALL, ESQUIRE
CARPENTER, BENNETT & MORRISSEY
744 Broad Street
Newark, New Jersey 07102
*Attorneys for International Telephone and Telegraph Corporation*

## OPINION OF THE COURT

GIBBONS, *Circuit Judge*

International Telephone & Telegraph Corp. (IT&T) appeals from a final judgment awarding to an employee, Martha Jewett, a promotion, $16,307 in back pay, and $31,194.79 in attorneys fees and expenses in her action charging sex discrimination in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* We reverse.

Jewett filed a charge of discrimination with the Equal Employment Opportunities Commission (EEOC) on November 11, 1974. The EEOC issued a notice of right to sue on February 3, 1976, and this action was commenced on April 26, 1976. Since timely filing is a prerequisite to the maintenance of a Title VII action[1] Jewitt must establish that she was subject to unlawful discrimination within 180 days prior to November 11, 1974. She contends that she did so in two ways: (1) by showing that within the relevant 180 days she was denied promotion to a position she sought, for which she was qualified, and to which a less qualified male was appointed[2]; and (2) by showing that a pattern or practice of intentional sex discrimination which disadvantaged her in opportunities for training prior to

1 *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

2 *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 791 (1973).

the relevant 180 days continued to disadvantage her in promotion during that period.[3]

The case was tried to the court without a jury, and in the findings of fact dictated from the bench no mention is made of a specific promotion denied her for which she applied and was qualified within the relevant period. Jewett urges, nevertheless, that there is such evidence. On July 8, 1974 she wrote a memorandum to the President of the IT&T division which employed her seeking a promotion, and on August 28, 1974 he interviewed her. About that time the positions of Supervisor of Employee Relations and Manager of Employment became available and were filled by a male, John McMahon. Jewett was a personnel assistant, and a high school graduate with no college training, then employed at IT&T grade 9. McMahon was a grade 16 employee with an Associate Degree in electronics. There is no evidence from which the court could have found that Jewett's qualifications equalled McMahon's. That undoubtedly explains why the district court made no finding of a specific incident of discrimination within the statutory period. At oral argument Jewett's attorney conceded that aside from the McMahon promotion she could point to no specific incident of discrimination within 180 days of November 11, 1974. That incident does not meet the tests for a prima facie case of disparate treatment since, although Jewett may have been qualified for the positions filled by McMahon, he had superior qualifications.

Rather than focus on a specific incident of discrimination, however, the district court appears to have premised liability on the existence of a systemwide continuing violation. We may assume that the continuing violation theory is available to remedy employment practices and policies, not otherwise shel-

---

3 *See* Kunda v. Muhlenberg College, 621 F.2d 532, 546 (3d Cir. 1980; Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

tered by law,[4] which operate to deny present employees transfer or promotion on the basis of sex, where the practice or policy accounting for the denial remains in effect within 180 days of the charge. *See Shehadeh v. Chesapeake & Potomac Telephone Co.*, 595 F.2d 711 (D. C. Cir. 1978); *Patterson v. American Tobacco Co.*, 586 F.2d 300 (8th Cir. 1978); *Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); see generally, Sullivan, Zimmer, & Richards, *Federal Statutory Law of Employment Discrimination* § 3.5 at 276-83 (1980). Suits may be brought by victims of one or more discriminatory acts occurring before the limitations period, so long as the plaintiff establishes that the offending practice is an ongoing one. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980); *Clark v. Olinkraft, Inc., supra.*[5] Such a case differs from *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), relied on by defendant I.T.&T. *Evans* dealt with a discrete one-time violation (a discriminatory discharge) which only had continuing effects, rather than with a pattern and practice of discrimination which continually, often imperceptibly, operates to hold women employees in lower echelons without making itself readily apparent.

To prevail on a continuing violation theory, however, the plaintiff must show more than the occurrence of isolated or sporadic acts of intentional discrimination. The preponderance of the evidence must establish that some form of intentional discrimination against the class of which plaintiff was a member was the company's "standard operating procedure." *Team-*

---

4 *Cf.* United Airlines, Inc. v. Evans, 431 U.S. 533 (1977) (impact within statutory period of bona fide seniority system exempt from Title VII by virtue of section 703(h), 42 U.S.C. § 2000e-2(h)).

5 The time of filing would, of course, mark the time for computing the two-year limitation on backpay, and it might even prevent the award of any monetary relief if the absence of job openings during those years were shown. *See* Sullivan, Zimmer & Richards, *supra*, at 280.

*sters v. United States*, 431 U.S. 324, 336 (1977). There is a substantial question whether the pretrial order (36a), which incorporates Jewett's factual contentions (47-49a), actually presented for trial a charge of pattern or practice of intentional sex discrimination, and there are some indications in the record that during the trial the court assumed such a case was not being presented (83a). Nevertheless, since a discriminatory pattern or practice amounting to a continuing violation affecting Jewett in the statutory period was cited by the district court in support of its judgment, we turn to the evidence on which the trial court relied.

That evidence related to the 1971 appointment of Thomas Kielty as Manager of Compensation. The court noted:

> I have no doubt in my mind that the genesis of this case lies in the fact this plaintiff could not get along with Mr. Kielty and Mr. Kielty could not get along with this plaintiff.
>
> . . .
>
> Now, I am confident that by 1971 she did, in fact, have personality problems. But what does that born of? There are documents, particularly, an exhibit introduced this morning, plaintiff's Exhibit 39, which is a memorandum prepared by Mr. Recchia, which demonstrates that it cannot be said that this was a plaintiff of ITT who had no ambition for advancement during her nearly 40 years of service with ITT. It cannot be said that she did not seek promotions. This document prepared by a supervisor mindful of an EEOC complaint states that in several portions that over the years she had repeatedly requested and demanded promotions and greater responsibility, and this is consistent with everything that I saw displayed on the witness stand.
>
> Well, what happens to someone after 20 or 30 years of dedication service? Not 40, because by 1971, it was nearly 30, not yet nearly 40. What happens in 1971 when you worked at a place since 1943 and you see a 27 or a 28 year old brought in and promoted into a position when you

> worked in a company longer than that individual has been on this earth? It is not unusual, it is not unexpected that there should be a clash of personality. I find to be the fact that all of the plaintiff's efforts in the area of sex discrimination originated due to her dissatisfaction with the interface between herself and Kielty. I think she would have even been prepared to accept the fact that Kielty had been promoted into that position or hired in to that position instead of her, because I do find it to be a fact that at that time she did not regard herself as being qualified for that position. She said that on the witness stand before me several weeks ago. (467a-471a)

Thus, significantly, the 1971 promotion of Kielty was not an act of sex discrimination, although it is identified as the triggering event for Jewett's dissatisfaction and her interest in women's rights. The court continued:

> But I think deep within her, she understood that something was wrong and when, thereafter, she didn't get the kind of raises she thought she should, the whole thing began to disintegrate and so within a matter of a month or two, I believe it was in July or August of 1973 after Kielty made her the only employee within his aegis who did not get a raise and denied her six or seven hundred dollar raise, the plaintiff became very interested in the cause of women's rights and wanted to take a seminar and that you denied her, then everything began to fall apart. (471a).

Evidence establishing her dissatisfaction with the kind of raises she thought she deserved does not, however, support a legitimate inference that her lack of progress was due to a pattern or practice of sex discrimination. But the court then concluded:

> There is no doubt in my mind that the plaintiff in this case would have gone much farther in this company had she been a man with the same talent, the same dedication. There would have been no need for this woman to have applied for a specific position. (471-2a)

We construe this language to be a finding by the district court that at some time in the past IT&T had a pattern or practice of selecting rank and file men, but not women, for promotion without the necessity for applying to a specific position.

There are several difficulties with reliance on that finding as support for the judgment. First, while there is evidence from which the court could find that men were selected for promotion without the need for applying for a specific position, no evidence is referred to, and we have found none, which would support the conclusion that as a matter of general practice women were not. Thus there was no prima facie case of a pattern or practice of sex discrimination in the respect relied upon. Second, the court did not expressly find that such a pattern or practice, assuming one existed, was still ongoing; if anything, the court implied that whatever discriminatory pattern or practice may have existed had ended long before the actionable period. Nor did the court find, nor on this record could it find, that IT&T's prior failure to select Jewett for promotion to jobs for which she had not applied disadvantaged her in promotion during the actionable period by the action of any rules of eligibility operative during that period.[6]

The only finding that the court made about "spill over" within the statutory period is this:

> I find it to be a fact that the plaintiff in this case was difficult and harassable during the actionable period, and I find it to be the fact that in large measure, those

---

6 *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Under *Griggs* an otherwise neutral promotion requirement or selection device which currently perpetuates the effects of past discrimination by its disproportionate impact on the victims of such discrimination gives rise to a continuing violation which arguably may be challenged by any present employee, since the existence of such a system deters that employee from enjoying her full Title VII rights and threatens to adversely effect her in the future. Patterson v. American Tobacco Co., *supra*, 586 F.2d at 304; Stallings v. Container Corp. of America, 75 F.R.D. 511 (D. Del. 1977); *see also* United Airlines, Inc. v. Evans, *supra*, 431 U.S. at 558 n.10; Schlei & Grossman, *Employment Discrimination Law* 234 (Supp. 1979).

> difficulties and harassability were caused by her perceived, correctly perceived, notion that she had been treated unfairly. (473a).

Thus the critical finding supporting the judgment below is that because of a prior pattern or practice at IT&T's Kearny Works of promoting rank and file men to positions for which they had not applied, while not doing the same for women, Jewett developed a personality disorder which operated to her disadvantage in the actionable period. However, Jewett's difficulty and irascibility during the operative period cannot, alone, support a finding that there is a continuing violation of Title VII. On this record, it would at best be evidence that the effects of a past violation continue, not that the violation itself continues. Moreover, even if we were to assume that the violation continued, there is no evidence of any causal relationship between the pattern or practice relied upon and the personality disorder referred to. Thus in two respects, both critical to support of the judgment on a continuing violation theory, the court's findings of fact are unsupportable.

Since there is no evidence showing either an instance of disparate treatment within 180 days of filing, or a pattern and practice of discrimination extending into the statutory 180-day period, IT&T was entitled to a judgment in its favor as a matter of law. That being so there is no occasion to consider other assignments of error relied upon by the appellant.[7] The judgment appealed from will be reversed.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

---

7 These include the contentions that the court improperly relied upon a consent decree to which IT&T is a party in another action, and that it improperly considered a post-charge promotion of Jewett as evidence of job availability and failure to promote in the actionable period.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2371

JEWETT, MARTHA,

*v.*

INTERNATIONAL TELEPHONE AND
TELEGRAPH CORPORATION,

*Appellant*

(D.C. Civil No. 76-0759)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued April 21, 1981

Before: SEITZ, *Chief Judge*
ALDISERT and GIBBONS, *Circuit Judges*

(Filed June 8, 1981)

ORDER AMENDING OPINION

The slip opinion in the above matter is hereby amended as follows:

Page 2

In the second full paragraph, line 6, insert a comma following the word "action"

In the second full paragraph, line 13, reverse the order of the semi colon and the footnote reference.

Page 3

In the third line of the first full paragraph "liabiliity" should be "liability"

Page 4

In the fifth line under italicize "see generally"

In the third line of footnote 5, "the" preceding the word "absence" should be deleted and replaced by "an"

Page 5-6

Eliminate the text and quoted material beginning with "The court noted:" at the end of the first paragraph on page 5 and continuing until and including the sentence "But the court then concluded:" at the bottom of page 6, and replace it with the following text:

Although plaintiff did not regard herself as being qualified for that position, the court found that when Kielty was brought in from outside and became her supervisor at age 28, it catalyzed or triggered in the plaintiff a growing resentment, since she had by then accumulated nearly 30 years of service to ITT and had made frequent made [sic] requests for greater responsibility. The court traced the genesis of this lawsuit to the ensuing personality clash between the plaintiff and Kielty, which peaked in summer 1973, when Kielty made her the only employee under his supervision not to get a raise. She became very interested in women's rights and asked permission to take a seminar on the subject at company expense, which was denied. The court's account of these events makes clear that

the 1971 promotion of Kielty was identified, not as an act of sex discrimination, but instead as a triggering event for Jewett's dissatisfaction. Subsequently, not getting the kind of pay raises she thought she deserved no doubt increased this dissatisfaction, but alone it does not support a legitimate inference that Jewett's lack of progress was due to a pattern or practice of sex discrimination.

However, the court then concluded:

Page 8

Eliminate the text beginning with "The only finding . . ." and ending with the quoted words "treated unfairly. (473a)." and replace it with the following:

The only finding that the court made about "spill over" within the statutory period was that the plaintiff was difficult and irascible during the actionable period and that those difficulties were largely caused "by her perceived, correctly perceived, notion that she had been treated unfairly." (437a).

JOHN J. GIBBONS
*Circuit Judge*

Dated: June 11, 1981

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*